IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-5463

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

BETTY I. GRUBB; and CHRISTIE GRUBB and STEVEN GRUBB, minors, by their guardian ad litem and trustee, Betty I. Grubb,

Petitioners,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA and PACIFIC GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA

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Date: November 17, 1971

I N D E X

	Page
OPINIONS BELOW.	2
JURISDICTION.	3
QUESTION PRESENTED.	4
CALIFORNIA CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	4
STATEMENT OF THE CASE	14
SUMMARY OF ARGUMENT	22
ARGUMENT.	23
I. OBJECTIONS TO PETITIONER'S STATEMENT OF THE CASE	23
II. THIS COURT HAS ALREADY RULED THAT CALIFORNIA WORKMEN'S COMPENSATION LAW AND REVIEW PROCEDURES MEET CONSTITUTIONAL REQUIREMENTS.	27
III. PETITIONER WAS AFFORDED DUE PROCESS. SHE HAD HAD A COMPLETE JUDICIAL DETERMINATION OF HER CASE AT THE REFEREE-TRIAL LEVEL, AT THE APPEALS BOARD REVIEW LEVEL, AND AT THE APPELLATE COURT LEVEL	29
IV. MRS. GRUBB WAS NOT DENIED EQUAL PROTECTION OF THE LAW	42
CONCLUSION.	51

TABLE OF AUTHORITIES CITED

Alaska Packers Ass'n v. Ind. Acc. Com. 294 U. S. 532; 55 S. Ct. 518; 79 L. Ed. 1044.	27
Allied Comp. Ins. Co. v. Ind. Acc. Com. 57 Cal. 2d 115.	37
Bankers Indem. Insurance Co. v. Ind. Acc. Com. (Merzoian), 4 Cal. 2d 89.	31
Dohany v. Rogers 281 U. S. 362; 50 S. Ct. 299.	42,49
Garza v. WCAB 3 Cal. 3d 312	38,51
Irvine v. Citrus, et al., 62 Cal. App. 2d 378	43

TE OF CALIFORNIA
on Relations Agency
rtment of Industrial Relations
ion of Industrial Accidents
men's Compensation Appeals Board
WCAB Form 61 (Rev. 1-70)

TABLE OF AUTHORITIES CITED (Cont'd)

	Page
LaVore v. Ind. Acc. Com. 29 Cal. App. 2d 255	
LeVesque v. WCAB 1 Cal. 3d 627	41
Louisville & Nashville R.R. Co. v. Schmidt 177 U.S. 230; 20 S. Ct. 620	50
Michon v. WCAB 15 Cal. App. 3d 917	42
Missouri v. Lewis 101 U. S. 22.	38
Morgan v. United States 298 U. S. 468, 56 S. Ct. 906.	49
Morgan v. United States 304 U. S. 1; 58 S. Ct. 773.	29,37
Napa Valley Elect. Co. v. Board of Railroad Com'rs of California 251 U. S. 366; 40 S. Ct. 174, 64 L. Ed. 310	29,37
National Union of Marine Cooks v. Arnold 348 U. S. 37; 75 S. Ct. 92.	27,28,40,43
Ohio v. Akron Park Metrop. Dist., et al. 281 U. S. 74; 50 S. Ct. 228	49
Pacific Coast Cas. Co. v. Pillsbury 171 Cal. 319.	42,43
Rudolph v. Athletic Commission, et al. 177 Cal. App. 2d 1.	32
Simon v. Craft 182 U. S. 427; 21 S. Ct. 836.	45
Solari v. Atlas-Universal Service, Inc. 215 Cal. App. 2d 587.	42
Western Metal Supply Co. v. Pillsburg 172 Cal. 407.	32
Wiseman v. Ind. Acc. Com. 46 Cal. 2d 570.	32
California Labor Code:	48
Section 111	
Section 112	5,32
Section 130	32
Section 132	33
	33

TE OF CALIFORNIA
...Relations Agency
...ment of Industrial Relations
...ion of Industrial Accidents
...ker's Compensation Appeals Board
WCAB Form 61 (Rev. 1-76)

TABLE OF AUTHORITIES CITED (Cont'd)

	Page
California Labor Code (Cont'd):	
Section 133	33
Section 134	33,36
Section 5300.	5,33
Section 5301.	6,33
Section 5310.	6,37
Section 5313.	7,34
Section 5315.	7,37
Section 5900.	7,37
Section 5902.	37
Section 5903.	8,37,38
Section 5906.	9,37
Section 5907.	9,37
Section 5950.	9,44
Section 5951.	10,44
Section 5952.	10,44,47,49, 50
Section 5953.	44
Section 5954.	11
Section 5955.	11,47
1 Hanna, California Law of Employee Injuries and Workmen's Compensation, § 1.01.	30
1 Hanna, California Law of Employee Injuries and Workmen's Compensation § 1.02.	31,33
1 Hanna, California Law of Employee Injuries and Workmen's Compensation, § 1.03.	34,35,36
11 Cal. Jur. 2d, Constitutional Law, §116	31
2 Cal Jur. 2d, Administrative Law, § 12	45
2 Cal. Jur. 2d, Administrative Law, § 85.	47
2 Cal. Jur. 2d, Administrative Law, § 103	47

OF CALIFORNIA
Relations Agency
ment of Industrial Relations
on of Industrial Accidents
ion's Compensation Appeals Board
YEAR Form 61 (Rev. 1-70)

TABLE OF AUTHORITIES CITED (Cont'd)

	Page
Rule 57 of the California Rules of Court.	12
California Constitution, Article XX, § 21.	4,30,31,44,47
U. S. Constitution, Amendment XIV, § 1	3, 4
Miscellaneous Codes:	
Calif. Admin. Code, Rules of Practice and Procedure, § 10800.	12,37
Code of Civil Procedure, § 1070	11
Code of Civil Procedure, § 1071	12
Code of Civil Procedure, § 1094.5	47
Government Code, § 11500.	47
28 U. S. Code, § 2101(c).	3

OF CALIFORNIA
Relations Agency
ment of Industrial Relations
of Industrial Accidents
en's Compensation Appeals Board
PAR Form 61 (Rev. 1-70)

IN THE

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No. 71-5463

BETTY I. GRUBB; and CHRISTIE GRUBB and STEVEN GRUBB, minors, by their guardian ad litem and trustee, Betty I. Grubb,

Petitioners

vs.

WORKMEN'S COMPENSATION APPEALS BOARD; and PACIFIC GAS AND ELECTRIC COMPANY,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA

Respondent, Workmen's Compensation Appeals Board of the State of California, respectfully submits its brief in opposition to the Petition for Writ of Certiorari filed by petitioners, Betty I. Grubb, and Christie Grubb and Steven Grubb by their Guardian ad Litem and Trustee, Betty I. Grubb.

The Appeals Board hereby refers to and by this reference adopts and incorporates as part of this brief, the brief of Respondent Pacific Gas & Electric Co. being filed with this Court herein.

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OPINIONS BELOW

The proceedings below involved two cases of the California Workmen's Compensation Appeals Board, WCAB No. 68 SF 221-075 and Case No. 68 SF 221-076. Both bear the same title and involve the same parties and in both Mrs. Grubb alleges that the death of her husband, Warren Grubb, was caused by a work related injury to Grubb's heart. The two cases differ only as to the manner in which Mrs. Grubb pleads the grounds for the employer's liability. They were consolidated for hearing and are hereafter referred to generally as "Mrs. Grubb's case." (The employer, respondent Pacific Gas & Electric Company, is hereafter referred to as PG&E.)

On September 17, 1969, the Appeals Board Referee, after hearing the cases, issued her Findings and Award for Medical-Legal costs, in both cases, thereby determining that Grubb "sustained no injury arising out of and in the course of his employment" and that his death "did not occur nor arise out of and in the course of his employment." At the same time the Referee filed her Report of Referee on Decision which in effect was a judicia opinion supporting her determination.

On December 4, 1969, the Board issued its Opinion and Order Granting Reconsideration for the purpose of initiating such further proceedings as might be indicated after study of the record.

On July 1, 1970, the Board filed its 30 page Opinion and Decision After Reconsideration, thereby indicating that the Board had studied the record thoroughly and thereby affirming and adopting the Referee's Findings and Award for Medical Legal costs as the Board's decision after reconsideration.

Petitioner then timely filed her Petition for Writ of

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Review in the Court of Appeal of the State of California, First Appellate District, and it was denied without opinion on May 10, 1971. Petitioner next filed her Petition for Hearing in the Supreme Court of the State of California and this was denied without opinion on June 23, 1971. (Exhibits B and C, respectively, the Petition for Certiorari).

JURISDICTION

Petitioner, Mrs. Grubb, purports to invoke the jurisdiction of this Court under 28 United States Code, Section 2101(c).

Petitioner asserts that the procedures established by the California Constitution and Legislature for the adjudication, reconsideration and review of workmen's compensation cases and the action taken by the Workmen's Compensation Appeals Board referee, by the Appeals Board itself, and by the California Appellate Courts, have denied her the due process and equal protection of law guaranteed in the United States Constitution, Amendment XIV, Section 1.

Respondent Board submits that Mrs. Grubb's cases were fully and correctly decided on their merits as shown by the Board's Answer to Petition for Writ of Review and the Board's Answer to Petition for Hearing in Supreme Court.

Respondent Board asserts that the referee, the Board, the California District Court of Appeal, and the California Supreme Court have judicially and correctly applied controlling statutes and case law, which provide procedural due process and equal protection of the law and are not in conflict with the Constitution, the laws of the United States, or the decisions of this Court. No federal question is presented or exists.

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QUESTION PRESENTED

Did the California procedures for the adjudication, reconsideration, and judicial review of workmen's compensation cases deprive petitioner of due process or equal protection of the law under the Fourteenth Amendment to the Constitution of the United States?

CALIFORNIA CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

California Constitution, Article XX, Section 21: "The Legislature is hereby expressly vested with plenary power unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by said workmen in the course of their employment, irrespective of the fault of any party. . .

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an Industrial Accident Commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions

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rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined. . ."

California Labor Code provides, in pertinent part, as follows:

"111. The Workmen's Compensation Appeals Board, consisting of seven members, shall exercise all judicial powers vested in it under this code. In all other respects, the Division of Industrial Accidents is under the control of the administrative director and, except as to those duties, powers, jurisdiction, responsibilities and purposes as are specifically vested in the appeals board, the administrative director shall exercise the powers of the head of a department within the meaning of Article 1 (commencing with Section 11150), Chapter 2, Part 1, Division 3, Title 2 of the Government Code with respect to the Division of Industrial Accidents which shall include supervision of and responsibility for personnel and the coordination of the work of the division, except personnel of the appeals board."

"5300. All the following proceedings shall be instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4.

OF CALIFORNIA
Relations Agency
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of Industrial Accidents
's Compensation Appeals Board
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"(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

"(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person.

"(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

"(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of this division.

"(e) For obtaining any order which by Division 4 the appeals board is authorized to make.

"(f) For the determination of any other matter, jurisdiction over which is vested by Division 4 in the Division of Industrial Accidents, including the administrative director and the appeals board."

"5301. The appeals board is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the courts as specified in this division."

"5310: The appeals board may appoint one or more referees in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a referee the proceedings on

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's Compensation Appeals Board
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any claim. The administrative director may appoint general referees. Any referee appointed by the administrative director has the powers, jurisdiction, and authority granted by law, by the order of appointment, and by the rules of the appeals board."

"5313. The appeals board or a referee shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

"5315. Within sixty (60) days after the filing of the findings, decision, order or award, the appeals board may confirm, adopt, modify or set aside the findings, order, decision, or award of a referee and may, with or without further proceedings, and with or without notice, enter its order, findings, decision, or award based upon the record in the case."

"5900. (a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a referee under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. Such petition shall be made only

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's Compensation Appeals Board
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within the time and in the manner specified in this chapter.

"(b) At any time within 60 days after the filing of an order, decision, or award made by a referee and the accompanying report, the appeals board may, on its own motion, grant reconsideration."

"5903: At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a referee granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds and no other:

"(a) That by such order, decision, or award made and filed by the appeals board or a referee, the appeals board acted without or in excess of its powers.

"(b) That the order, decision or award was procured by fraud.

"(c) That the evidence does not justify the findings of fact.

"(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.

"(e) That the findings of fact do not support the order, decision, or award.

"Nothing contained in this section shall limit the grant of continuing jurisdiction contained in Sections 5803 to 5805 inclusive."

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Compensation Appeals Board
B Form 61 (Rev 1 70)

"5906. Upon the filing of a petition for reconsideration, or having granted reconsideration upon its own motion, the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or referee on the basis of the evidence previously submitted in the case, or may grant reconsideration and direct the taking of additional evidence. Notice of the time and place of any hearing on reconsideration shall be given to the petitioner and adverse parties and to such other persons as the appeals board orders."

"5907. If at the time of granting reconsideration, it appears to the satisfaction of the appeals board that no sufficient reason exists for taking further testimony, the appeals board may affirm, rescind, alter or amend the order, decision, or award made and filed by the appeals board or referee and may, without further proceedings, without notice, and without setting a time and place for further hearing, enter its findings, order, decision, or award based upon the record in the case."

"5950: Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration.

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The application for writ of review must be made within 30 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 30 days after the filing of the order, decision, or award following reconsideration.

"5951. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the appeals board to certify its record in the case to the court within the time therein specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the record of the appeals board, as certified to by it.

"5952. The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:

"(a) The appeals board acted without or in excess of its powers.

"(b) The order, decision, or award was procured by fraud.

"(c) The order, decision, or award was unreasonable.

"(d) The order, decision, or award was not supported by substantial evidence.

"(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

"Nothing in this section shall permit the court

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Division of Industrial Accidents
Workers' Compensation Appeals Board

to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

"5954: The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings in the courts under the provisions of this article. A copy of every pleading filed pursuant to the terms of this article shall be served on the appeals board and upon every party who entered an appearance in the action before the appeals board and whose interest therein is adverse to the party filing such pleading."

"5955: No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases."

California Code of Civil Procedure, provides, in pertinent part, as follows:

"1070. Direction and Return of Writ -- The Writ [of review] may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to

F CALIFORNIA
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Compensation Appeals Board
Form 61 (Rev. 1 70)

a tribunal, the clerk, if there be one, must return the writ with the transcript required."

"1071. Form and Contents -- The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ . . . a transcript of the record and proceedings (describing or referring to them with convenient certainty) that the same may be reviewed by the court . . ."

Rule 57 of the California Rules of Court provides:

"(a) [Petition] A petition to review an order or award of the Industrial Accident Commission shall be accompanied by proof of service of two copies thereof on the Industrial Accident Commission and one copy upon each party who entered an appearance in the action before the Industrial Accident Commission and whose interest therein is adverse to the party filing the petition. If it is claimed that the decision is not supported by substantial evidence, the petition must fairly state all the material evidence relative to the point at issue. [As amended effective November 13, 1951.]

"(b) [Answer and briefs] Within 20 days after service of the petition, the commission and any real party in interest may serve and file or join in the filing of an answer and brief. Within 10 days after service of an answer, the petitioner may serve and file a reply. Service of the answer and reply shall also be made upon all adverse parties. [As amended effective November 13, 1951.]"

California Administrative Code, Rules of Practice and

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Procedure of the Workmen's Compensation Appeals Board, provides, in pertinent, part, as follows:

"10800. Referee Decisions and Orders. Any order, decision, or award which may be made by the Appeals Board may be made by the referee to whom a case has been assigned for trial or other disposition, except those expressly reserved to the Appeals Board, Appeals Board Members, Presiding Referees and referees in charge of branch offices, under Labor Code Sections 5900 to 5911, or by Rules 10790, 10794 and 10796."

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STATEMENT OF THE CASE

Decedent, Warren Eli Grubb, born December 5, 1920, was stricken with severe chest pains for the first time on Saturday, June 10, 1967, while he was at home mowing his lawn or moving his lawn mower, on his own time. He had to sit down because he was short of breath. Later the same day Grubb, while driving on a personal errand, on his own time, had to lie down on the front seat to get his breath.

On the following day, Sunday, June 11, while carrying an ice chest on a picnic, likewise on his own time, Grubb became short of breath and had to stop, sit down, and rest. While first going in to his office on Monday morning, June 12, i.e., while walking from the parking lot, Grubb became extremely weak and had to stop and lean against the building to rest.

Again on Saturday, June 17, while walking near his home, also on his own time, Grubb "didn't think he would be able to get back up the hill." On Monday and Tuesday, June 19 and 20, Grubb had "little chest pains" during the day (but there is no indication as to whether they occurred while working or on his own time).

Twelve days after the first chest pains Grubb was stricken with a fatal heart attack about 2:30 p.m. on June 21, 1967, while on a sedentary work project for PG&E. He was taken to a hospital where he died almost within the hour from a coronary thrombosis.

Grubb left his widow and two minor children. On February 21, 1968, Mrs. Grubb for herself and the children filed Application for Adjudication of Claim, Case No. 68 SF 221-075, alleging cumulative stress and strain of employment caused injury to decedent's heart, resulting in death. The dates of cumulative injury were expressly limited by stipulation at the hearing of

CALIFORNIA
Relations Agency
of Industrial Relations
Industrial Accidents
Compensation Appeals Board
Form 61 (Rev. 1-70)

September 30, 1968, to the period from June 10, 1967, through and including June 21, 1967. (Lines 9-16, page 1, RT, hearing of September 30, 1968).

On February 21, 1968, Mrs. Grubb similarly filed Application for Adjudication of Claim, Case No. 68 SF 221-076, alleging injury occurred from heart attack proximately caused by employment on date of death.

The principal issue in each case was the cause of death, i.e., whether the death was caused by Grubb's work.

After consolidation of the cases, hearings were held before Workmen's Compensation Appeals Board Referees on September 30, 1968, April 9, 1969, and June 16 and 17, 1969. Mrs. Grubb's testimony on September 30, 1968, and April 9, 1969, the only testimony received on those dates, was fully and completely summarized by the Referee's Minutes of Hearing.

The other evidence in the case consisted of written medical reports and other records, verbatim depositions of certain witnesses, and 140 pages of hearing testimony reported and transcribed by a qualified court reporter. Thus there was a full and complete record before the referee who decided the cases, as well as before the Appeals Board on Reconsideration. Apparently Mrs. Grubb makes no complaint about the adequacy of the record.

More specifically the extensive, if not voluminous, evidence included the medical report of Peter E. Patch, M.D., Grubb's family doctor; testimony of Dr. Patch and of Frederic Mintz, M.D., a defense doctor; the testimony of Mrs. Grubb, her mother, Mrs. Bugh, certain of Grubb's fellow employees, including Glenn A. Merritt, his immediate supervisor; and the death certificate.

The basic facts are that Grubb started to work for PG&E

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Industrial Accidents
Compensation Appeals Board
Form 61 (Rev. 1 70)

in 1946 as a groundsman, progressed to apprentice lineman in 1947, and served as a lineman and temporary line foreman until 1953 when he became a permanent line foreman. He served as a line foreman until 1961 when he transferred to the claims and safety department as a safety supervisor. In 1965 he was promoted to senior safety supervisor.

As a senior safety supervisor he was in the construction section. Prior to working on the special project in San Francisco Grubb's regular assignment covered the area from Bakersfield in the south to the Oregon border in the north. However, he only worked in certain areas, primarily, during the time that he worked on his regular assignment, the bulk of his previous and regular work being in the Bay Area and around Stockton, Sacramento, and San Jose, with occasional trips into the outlying areas.

As a senior safety supervisor in the construction section, Grubb would visit crews and audit their work to make sure that they were doing the work safely and to correct any infractions of company safety rules or any state safety order infractions that might be noted. In addition he attended the meetings of various employees held for the purpose of accident prevention and some first aid. He was also assigned various special jobs from time to time which entailed some additional investigation in addition to his regular investigations carried on in connection with any accidents that occurred to the employees. (Testimony of Glenn A. Merritt, line 15, page 7, to line 26, page 10, RT, Hearing of June 16, 1969).

In February 1967, Grubb was assigned to practically full time work on a special statistical project called the American Gas Association Survey of Natural Gas Related Incidents (referred to herein as the AGA project). Approximately 12 other employees of

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Division of Industrial Accidents
Workmen's Compensation Appeals Board

PG&E's safety department also worked on the project from time to time as available.

The project entailed reviewing accident reports covering a ten year period involving members of the public or third parties where they related to PG&E's product, gas, and to tally certain information from those reports onto a tally sheet for combination into a report for the company showing a ten year survey of that type of incident by cause, kind, location (testimony of Glenn A. Merritt, line 9, page 16, RT, Hearing of June 16, 1969).

During the time that he was working on the AGA project Grubb was taken off his regular work and was relieved of his regular duties except for an occasional investigation. Grubb's work on the project was conducted principally at PG&E offices in San Francisco where he worked a regular 8 hour day without overtime Monday through Friday of each week. He had some duties in coordinating the work of the other 12 people working on the project, but was not in charge of the project or responsible for its success or failure, as he was subordinate to at least three other persons in connection with that work.

Grubb's work on the AGA project was conducted at the company's offices in San Francisco and on a few occasions at a record storage center in South San Francisco.

Grubb was assigned a company owned automobile for full time use in connection with his regular field assignment, and he continued to use the vehicle in driving from his home in Kensington (in the Berkeley area) to San Francisco and return each working day while he was engaged in the special AGA project.

Mrs. Grubb testified that as far as she knew Grubb had no chest pains in connection with his work or otherwise prior to

CALIFORNIA
Labor and Employment Agency
Department of Industrial Relations
Division of Industrial Accidents
Workers' Compensation Appeals Board
Form 61 (Rev. 1 70)

the incident of Saturday, June 10, 1967.

During the working week that commenced Monday, June 12, Grubb continued at the statistical work for the AGA project. On Tuesday morning, June 13, he was examined by his family physician, Peter E. Patch, M.D., who arranged for an electrocardiogram (EKG). At the doctor's suggestion, Grubb remained off work the remainder of the day. After learning the results of the EKG, Dr. Patch phoned Grubb on the afternoon of June 13, and advised Grubb he could return to work the next day, but to be careful, to cut down his weight, and to take exercises by way of brisk walks.

Up until the receipt of this advice, Grubb had been eating lunch at noon with other men in the office, and he had not taken walks during his lunch period. Pursuant to Dr. Patch's instructions, Grubb thereafter took a light lunch, (sometimes by himself) and took a brisk walk during the rest of his lunch hour. As far as the record shows, Grubb's lunch hour was on his own time and was not part of his eight hour working day.

Mrs. Grubb testified that on his noontime walks, Grubb was watching the Bart construction along Market Street in San Francisco in connection with PG&E safety programs as part of his work as a safety supervisor. This evidence is strongly disputed.

Grubb continued working at the AGA project as usual on June 19, 20 and 21. Because of the chest pains of the 18th and 19th, he asked Mrs. Grubb to arrange on the 21st for another appointment with Dr. Patch, but Mrs. Grubb was not able to reach Dr. Patch prior to learning of Grubb's death.

At noon on June 21, Grubb had a light lunch with Karl Adkins, a fellow employee and Grubb's best friend. After lunch Grubb took his usual noontime walk upon separating from Adkins

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of Industrial Relations
Industrial Accidents
Compensation Appeals Board
Form 61 (Rev. 1-70)

after eating, and there is no information available as to where he walked or what he did until he returned to the office about 1:00 p.m. and resumed his statistical work (which he did while seated) on the AGA project.

About 2:00 p.m. Adkins had some time on his hands and went into the room where Grubb was working and offered to help Grubb by reading off certain needed information from five by eight file cards, so that Grubb could write down the information. About 2:30 p.m., after Grubb and Adkins had been working thus for a short time, Grubb arose, said he had to leave, and left the room.

A few minutes later Grubb was found collapsed in his own office a few feet away. Fellow employees gave mouth-to-mouth rescusitation and cardiac massage, and he was taken by ambulance to Franklin Hospital where, the death certificate indicates, he died at 3:45 p.m. that same day without regaining consciousness.

Dr. Patch's report of March 28, 1968 stated in its last paragraph:

> "In my opinion his death was quite likely due to sudden onset of abnormal heart rhythm which may well have been related to stress caused by his employment."

Dr. Patch testified at the morning hearing on June 17, 1969, reiterating his above quoted statement. On cross-examination, counsel for the employer described Grubb's employment as the employer believed it to be, and Dr. Patch indicated that as so described the working conditions were the "ideal situation" which he had in mind when he permitted Grubb to return to work.

Frederic Mintz, M.D., was called as a witness by PG&E. He agreed with the diagnosis of acute coronary thrombosis set forth on the death certificate, and stated in response to a

OF CALIFORNIA
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of Industrial Accidents
's Compensation Appeals Board
AB Form 61 (Rev. 1-70)

hypothetical question:

"No, his work activity as has been described to me, does not appear to me to have been a factor in the final outcome.

* * * * *

"He appears to have been engaged in what was in fact a very sedentary activity, as I understand it, at the time of his death and for some period prior to that he had been seated and engaged in work which does not seem to have been heavy or emotionally exciting in any way. This might be the same -- he might have well been engaged in the very same activity had he been in the hospital." (RT, June 17, 1969, p. 11, line 21 to p. 12, line 5)

Dr. Mintz also testified that knowing what he did at the time he testified, he would not have permitted Grubb to return to work, but would have hospitalized him. Dr. Mintz' testimony is described further in Section V hereof.

On September 17, 1969, the referee filed her Findings and Award for Medical-Legal Costs, in both cases, thereby determining that Grubb "sustained no injury arising out of and in the course of his employment" and that his death "did not occur nor arise out of and in the course of his employment." The referee at the same time filed her Report of Referee on Decision.

On October 8, 1969, Mrs. Grubb filed her Petition for Reconsideration in both cases.

On December 4, 1969, the Board filed its Opinion and Order Granting Reconsideration for such further proceedings as might be indicated after study of the record.

On July 1, 1970, the Board filed its 30 page Opinion and

F CALIFORNIA
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f Industrial Accidents
s Compensation Appeals Board

Decision After Reconsideration, thereby affirming and adopting Referee's Findings and Award for Medical-Legal Costs as the Board's decision after reconsideration. (Appendix A., Petition for Certiorari)

On July 30, 1970, Mrs. Grubb filed her 83 page Petition for Writ of Review in the Court of Appeal, State of California, First Appellate District. (Appendix B, Petition for Certiorari). She urged that the uncontroverted evidence and compelling inferences clearly established that Grubb's employment aggravated his underlying heart condition and precipitated his death and that the Board erred in denying compensation to his widow.

Respondents Workmen's Compensation Appeals Board and PG&E filed their respective extensive answers to said Petition for Writ of Review.

Mrs. Grubb filed her 34 page Reply on Behalf of Petitioners to Answer of Respondents to Petition for Writ of Review.

On May 10, 1971, the Court of Appeal denied Mrs. Grubb's Petition for Writ of Review without opinion (Exhibit C, the Petition for Certiorari).

On May 20, 1971, Mrs. Grubb filed her extensive Petition for Hearing in the Supreme Court of the State of California (Appendix B, Petition for Writ of Certiorari). Mrs. Grubb raised therein substantially the same questions raised in her Petition for Writ of Review.

Respondents Appeals Board and PG&E filed their respective answers to said Petition for Hearing (Appendices G and H, PG&E Brief herein).

On June 23, 1971, the California Supreme Court without

CALIFORNIA
Industrial Relations Agency
Department of Industrial Relations
Division of Industrial Accidents
Workmen's Compensation Appeals Board

issuing an opinion denied Mrs. Grubb's Petition for Hearing. (Exhibit B, the Petition for Certiorari)

Thereafter Mrs. Grubb filed her Petition for Certiorari before this Honorable Court.

SUMMARY OF ARGUMENT

I

Mrs. Grubb was afforded due process of law in every respect. An "absolute right of appeal" was not necessary since there was a complete adjudication of her rights at the trial, review, and appellate court levels after full and complete hearing on notice.

At the trial level, the case was heard and decided judicially against Mrs. Grubb by a Workmen's Compensation Appeals Board trial referee who had and exercised judicial powers. Then the referee's entire record of trial (hearing) was reviewed and affirmed in a 30 page opinion by the Appeals Board itself, acting as an independent, constitutionally authorized, appellate or reviewing body or tribunal which was in effect a court.

Thereafter, the Appeals Board's determination was subjected to adequate review and in effect affirmed by the California District Court of Appeal and the California Supreme Court.

The California Constitutional provisions authorizing the Legislature to establish a complete system of workmen's compensation, including the judicial proceedings and authority followed and exercised here, and the activating legislation have been consistently upheld as valid and proper exercise of the State's police power.

CALIFORNIA
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Industrial Accidents
Compensation Appeals Board

II

Mrs. Grubb has also been afforded equal protection of the law. She was not deprived thereof in the following particulars, as she claims:

A. Mrs. Grubb's case is not entitled to the trial de novo or to review on an appeal, as provided for determinations made by certain California administrative agencies to which Mrs. Grubb refers, for the Workmen's Compensation Appeals Board is not an administrative agency at all. Rather the Board is entirely different in nature and function since it is a constitutionally authorized judicial body or tribunal (exercising judicial functions only) whose judicial decisions are quite properly reviewable only by Petition for Writ of Review as provided by the California Constitution and Statutes.

B. Neither the Board nor California law has applied or required more difficult or stricter standards of proof in or for this heart death case than are applied in other workmen's compensation cases. The Board and California law consistently apply the same standards to all heart death cases.

C. Contrary to Mrs. Grubb's assertion, specific statutory law and Appeals Board and California appellate court decisions definitely require that the determinations of the Board and referee be supported by substantial evidence based upon the entire record. The decision here was so supported.

ARGUMENT

I

OBJECTIONS TO PETITIONER'S STATEMENT OF THE CASE

The Board and Mrs. Grubb have diametrically opposing views as to certain facts and evidence in the case.

CALIFORNIA
Agency
of Industrial Relations
Industrial Accidents
Compensation Appeals Board

STATEMENT IGNORES VITAL FACTS

The Appeals Board's foremost objection to Mrs. Grubb's Statement of the Case lies in the fact that she ignores the substantial evidence in the record showing affirmatively that Grubb's heart attack was caused by and attributable solely to extensive, non-industrial exposure or non-industrial heart injuries.

It is undisputed that Grubb's first or original heart attacks occurred almost two weeks before his death while he was mowing his lawn or moving his lawn mower and while engaged in other nonindustrial activities having nothing to do with his work. More specifically, his original attacks all occurred on his own time, on a weekend, at his own home and at other locations completely unconnected with his employment. And substantial medical evidence attributes Grubb's death solely to such nonindustrial heart injuries.

Further, Mrs. Grubb ignores the fact that Grubb's own family doctor, Dr. Patch, recommended that Grubb continue working

CALIFORNIA
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of Industrial Relations
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despite the nonindustrial heart attacks and, indeed, recommended that Grubb take walks during the noon hour as exercise beneficial for his heart condition.

VITAL DISCREPANCIES IN THE STATEMENT

Contrary to the foregoing, Mrs. Grubb's Statement of the Case tends to leave the impression that Grubb's heart condition and final heart attack were undisputably caused by his work (page 5, the Petition herein) and that all of his heart attacks occurred while Grubb was at work.

More specifically, because of a number of discrepancies, the medical evidence is, in the Board's opinion, not correctly reflected in the Statement, commencing at line 1, page 6 of the Petition for Certiorari, in the following among other particulars:

1. Dr. Mintz did not say Grubb's employment aggravated his weakened heart condition.

At line 1, page 6, the Petition for Writ of Certiorari states: "The two medical witnesses both agreed that Mr. Grubb should have been hospitalized instead of being allowed to continue his employment. The reasons given by both doctors was that Mr. Grubb's employment aggravated his weakened heart condition by placing an increased load on his heart. . ."

Dr. Mintz was obviously one of the two doctors indicated above. The Board respectfully submits that the above statement is absolutely incorrect as there is no evidence in the record to indicate that Dr. Mintz believed or said that Grubb's employment aggravated his weakened heart condition. Indeed, as shown below, the Board submits the evidence is completely contrary to Mrs. Grubb's assertion.

CALIFORNIA
Agency
of Industrial Relations

2. In fact, Dr. Mintz felt Grubb's employment did not aggravate his heart condition.

In fact, the record indicates Dr. Mintz considered that Grubb's employment did not aggravate his heart condition or cause or accelerate the death.

Reporter's Transcript, Afternoon Hearing, June 17, 1969, page 11, line 17 to page 12, line 5 reads in part as follows:

"Q Now, in your opinion, did his work effort, as described to you, have anything to do with his death either in causing or accelerating the time of his death, from the facts as I have given them to you?

A No, his work activity, as has been described to me, does not appear to me to have been a factor in the final outcome.

Q Why?

A He appears to have been engaged in what was in fact a very sedentary activity, as I understand it, at the time of his death and for some period prior to that he had been seated and engaged in work which does not seem to have been heavy or emotionally exciting in any way. This might be the same--he might have well been engaged in the very same activity had he been in the hospital." (Emphasis added)

3. Dr. Mintz felt hospitalization would be advantageous only in facilitating treatment when needed.

Dr. Mintz did not believe hospitalization would prevent further heart attacks or necessarily avoid aggravation of Grubb's condition. He clearly felt that further attacks could be expected

CALIFORNIA
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of Industrial Relations
Industrial Accidents
Compensation Appeals Board

because of the nonindustrial heart injury.

The real reason Dr. Mintz believed hospitalization would have been in order was to keep Grubb at a place where he would have immediate medical and hospital attention if and when such future, expected heart attacks occurred.

As Dr. Mintz testified (Reporter's Transcript, Afternoon Hearing, June 17, 1969, page 14, lines 19-25), Grubb's prospects of survival would have been better had he been hospitalized in that "we would have been better able to take care of the terminal event." But he also testified that even with the various measures that might have been taken in the hospital there could not have been an assurance that decedent would have survived the final attack (Reporter's Transcript, Afternoon Hearing, June 17, 1969, page 16, lines 8-13).

II

THIS COURT HAS ALREADY RULED THAT CALIFORNIA WORKMEN'S COMPENSATION LAW AND REVIEW PROCEDURES MEET CONSTITUTIONAL REQUIREMENTS.

The Court has already found that California workmen's compensation law, in substantially its present form insofar as is pertinent to the question here presented, conforms to the requirements of the United States Constitution. Alaska Packers Ass'n v. Ind. Acc. Com. (1935), 294 U.S. 532; 55 S. Ct. 518; 79 L. Ed. 1044.

Even more pertinent to the precise question now before this Court is Napa Valley Electric Co. v. Board of Railroad Com'rs of California (1919), 251 U.S. 366; 40 S. Ct. 174; 64 L. Ed. 310. There it was argued that by denying a Petition for Writ of Review (which petition sought review of a determination by the California Board of Railroad Commissioner) without reviewing the record in

the case (as here), the California Supreme Court had failed to adjudicate the question before it. Incidentally, insofar as is here pertinent, the status of the Decisions of the California Board of Railroad Commissioners (now the Public Utilities Commission) and the legislation authorizing review of its proceedings by the California Appellate Courts appear to be practically parallel to that governing the California Workmen's Compensation Appeals Board.

In the Napa Valley opinion this Court likened the denial of the writ (on the basis of the Petition for Writ of Review and without review of the record itself) to the "at times, necessary practice of the courts to determine upon the face of a pleading what action should be taken upon it" and this Court said at page 372 of the official report:

> "Whether upon such an exhibition of the proceedings and questions the court was required to pursue the details of the section or decide upon the petition was a matter of the construction of the section and the procedure under it. And the Supreme Court has so decided. L. Ghriest, Petitioner v. R. R. Com'n, 170 Cal. 63, 148 Pac. 195; Mt. Konocti Light & Power Co. v. Max Thelen et al., 170 Cal. 468, 150 Pac. 359; E. Clemens Horst Co. v. R. R. Commission, 175 Cal. 660, 166 Pac. 804; Hooper & Co. v. R. R. Comm., 175 Cal. 811, 165 Pac. 689. In those cases the application for writs of certiorari were denied, which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the

CALIFORNIA
Labor Agency
Department of Industrial Relations
Division of Industrial Accidents
Workmen's Compensation Appeals Board

United States or of the state of California. And so with the denial of the petition of the Electric Company---it had like effect and was the exercise of the judicial powers of the court. And we repeat, to enable the invocation of such powers was the purpose of section 67, and they could be exercised upon the display in the petition of the proceedings before the Commission and of the grounds upon which they were assailed. And we agree with the District Court that 'the denial of the petition was necessarily a final judicial determination. . .'

* * * * *

"The Court held, and we concur, that absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the question presented, and its subsequent conclusive effect upon the rights of the Electric Company. . ."

Further, it appears that the procedures followed in this case under the governing California law did not deprive Mrs. Grubb of due process or equal protection of law, and met the requirements of the Constitution of the United States. Morgan v. United States (1936), 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; Morgan v. United States (1938), 304 U. S. 1; 58 S. Ct. 773.

III

PETITIONER WAS AFFORDED DUE PROCESS. SHE HAS HAD A COMPLETE JUDICIAL DETERMINATION OF HER CASE AT THE REFEREE-TRIAL LEVEL, AT THE APPEALS BOARD REVIEW LEVEL, AND AT THE APPELLATE COURT LEVEL.

Mrs. Grubb's case has been decided against her on the

CALIFORNIA
Agency
Industrial Relations
Accidents
Appeals Board
(Rev. 1-70)

merits after full and complete judicial consideration on the trial and review level. Both procedurally and substantively she has been afforded due process of law.

As shown in some detail below, the case was originally tried and decided by a trial referee of the Appeals Board; the Appeals Board itself conducted a "non-discretionary" judicial, appellate review of the entire record; the California District Court of Appeal denied Mrs. Grubb's Petition for Writ of Review, and the California Supreme Court denied a hearing in that Court.

A. TRUE JUDICIAL AUTHORITY IS LODGED IN WORKMEN'S COMPENSATION APPEALS BOARD AND ITS REFEREES.

The California Workmen's Compensation Appeals Board is a judicial body and performs only judicial functions, as is shown by Warren Hanna, the outstanding authority on California Workmen's Compensation Law, in 1 Hanna, California Law of Employee Injuries and Workmen's Compensation, § 1.01 (3):[2/]

> "In order to separate the judicial and administrative functions of the Industrial Accident Commission and to clarify ambiguities in the division of authority between the Commission chairman and panel members, the 1965 Legislature abolished the Commission, as such, and formed in its place the Workmen's Compensation Appeals Board to exercise the judicial functions formerly performed by the Commission, and the office of Administrative Director of the Division of Industrial Accidents to exercise the nonjudicial functions."

The California Constitution, of course, had in 1918

2/ Referred to hereafter as "Hanna".

F CALIFORNIA
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Compensation Appeals Board
R Form 81 (Rev. 1 70)

authorized the lodging of judicial power in a special tribunal for the determination of disputes in workmen's compensation appeals matters. (California Constitution, Art. XX, Section 21; 11 Cal. Jur. 2d, Constitutional Law, §116, page 471).

And this concept of the Appeals Board as a constitutional judicial tribunal is described in 1 Hanna, California Law of Employee Injuries and Workmen's Compensation, § 1.02 (8), at page 1-12, as follows:

> "It is well established that the Industrial Accident Commission was, and therefore the Workmen's Compensation Appeals Board is, a court, in legal effect, since its power to hear and decide disputes in respect to workmen's compensation is an exercise of judicial power. Its powers, of course, do not extend beyond the settlement of disputes arising under the legislation contemplated by Article XX, Section 21, of the State Constitution. Within the scope of its limited jurisdiction, however, it performs precisely the same functions that are performed by any court in passing upon controversies brought before it. And since the Appeals Board is a judicial body exercising judicial functions, its decisions and awards are subject to the same general legal principles which circumscribe and regulate the judgments of all judicial tribunals, and are res judicata, if final, in subsequent court actions between the same parties and involving the same issues."

In Bankers Indemnity Insurance Company v. Ind. Acc. Com. (Merzoian) (1935), 4 Cal. 2d 89, at page 97 the California Supreme

CALIFORNIA
Agency
of Industrial Relations
Industrial Accidents
Compensation Appeals Board
(Rev. 1 70)

Court said, in holding that the Industrial Accident Commission, acting as a court, had equitable powers:

> ". . . it is apparent that the decision of the Supreme Court of Utah is not in harmony with the decisions of this court, which hold that the commission in matters within its jurisdiction acts as a judicial body and exercises judicial functions and in legal effect is a court [Citations]."

And in Solari v. Atlas-Universal Service, Inc. (1963), 215 Cal. App. 2d 587, at page 593 the court said:

> "Before proceeding to answer these questions in the present case we should point out that it has been held that the Industrial Accident Commission is a constitutional court and that its final decisions are given res judicata effect."

In this connection, attention is also invited to Pacific Coast Casualty Co. v. Pillsbury (1915), 171 Cal. 319, 322, and Western Metal Supply Co. v. Pillsbury (1916), 172 Cal. 407. Beginning on page 411 of the latter case Mr. Justice Sloss lists the various powers of the Industrial Accident Commission which supported the court's conclusions. It might be well to mention some of these with reference to today's Labor Code provisions:

1. The Board "shall exercise all judicial powers vested in it under this Code." (Labor Code Section 111)

2. All members shall be selected with due consideration of their judicial temperament and abilities, and their salaries shall be equal to that of a judge of the superior court. (Labor Code Section 112).

CALIFORNIA
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Industrial Accidents
Compensation Appeals Board
... 61 (Rev. 1-70)

3. The Board has power to administer oaths, and issue subpoenas (Labor Code Section 130); and to punish for contempt in the same manner and to the same extent as courts of record (Labor Code Section 132);

4. The Board "shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under" the Labor Code. (Labor Code Section 133)

5. The Board may issue writs or summons, warrants of attachment and all necessary process in proceedings for contempt in like manner and to the same extent as courts of record. (Labor Code Section 134).

6. The Board is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300, subject only to review by the appellate courts. (Labor Code Section 5301).

7. "All the following proceedings shall be instituted before the Appeals Board and not elsewhere, except as otherwise provided in Division 4.

"(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." (Labor Code Section 5300).

Also of interest is 1 Hanna, Section 1.02(9), page 1-13.

B. THE WORKMEN'S COMPENSATION APPEALS BOARD REFEREE ACTED AS A TRIAL COURT IN DETERMINING MRS. GRUBB'S CASE.

Mrs. Grubb certainly had her day in trial court.

As indicated in the Board's Statement of the Case herein, the referee held extensive hearings at the trial level in this case, and there has been no complaint as to the adequacy of the record which was complete and accurate.

F CALIFORNIA
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s Compensation Appeals Board
(Rev. 1 70)

All of the testimony was carefully and fully summarized in the referee's minutes, and, except for part of Mrs. Grubb's testimony, all testimony, including that of Dr. Patch and Dr. Mintz, was transcribed by a qualified court reporter or set forth in depositions which were likewise reported and transcribed verbatim. All other medical evidence was set forth in written reports or records which were received in evidence. Mrs. Grubb's medical evidence and other evidence was all received and considered, and she was permitted ample opportunity to present same.

Not only did the referee by her Findings and Award determine the case on the merits, but she filed her carefully prepared opinion or report showing the basis for her determination.

Under California law, the referee who hears a workmen's compensation case is for all practical purposes the trial judge or trial court. He is not functioning as an administrative official, but is a part of the judiciary.

Labor Code Section 5313 succinctly but nonetheless effectively provides the referee's judicial authority:

> "The appeals board or a referee shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

Hanna well describes the referee's position (1 Hanna, Section 1.03 (3) (c) as follows:

CALIFORNIA
Agency
of Industrial Relations
Industrial Accidents
Compensation Appeals Board
Form 61 (Rev. 1 70)

"The principal function of the referee is the hearing and deciding of cases. With but rare exceptions, all hearings on compensation claims are held before referees, and, except for certain decisions reserved by Appeals Board rule for action by the Board, a Board member, a presiding referee, or referee in charge, all decisions are likewise prepared and issued by referees. . ."

And in 1 Hanna, §1.03(3)(d) the referee's judicial powers are listed and his judicial authority is more specifically delineated as follows:

"In any case which has been regularly assigned to him for trial under the provisions of Labor Code Sections 5309 and 5310, a referee has full power, jurisdiction, and authority to hear and determine all issues of fact and law presented to him and to issue such interlocutory and ex parte orders, processes, and notices, as well as final orders, findings, decisions, and awards, as are necessary for a full and expeditious adjudication of the case, except those expressly reserved to the Appeals Board, a Board member, presiding referees, or referees in charge of branch offices. Orders, findings, decisions, and awards properly issued by a referee are considered those of the Appeals Board unless reconsideration is granted. . ."

The referee's qualifications clearly contemplate the performance of judicial functions (1 Hanna, §1.03 (3) (b)) and are described as follows:

". . . Salaries of referees are fixed by the

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(Rev. 1 70)

State Personnel Board for a class of positions which performs judicial functions. Under civil service requirements, candidates for the post of referee must be attorneys-at-law with at least five years of practice. . . . Before entering upon his duties the referee must be sworn, before an officer authorized to administer oaths, faithfully and fairly to hear and determine the matters and issues referred to him, to make just findings, and to report according to his understanding." (p.1-20)

Similarly the referee's powers clearly show that he is functioning as a court (1 Hanna, §1.03(3), page 1-21):

". . . He is empowered to administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the state. He may appoint a trustee or guardian ad litem to appear for and represent any minor or incompetent party to a proceeding. He may order the joinder of any additional party or parties whose presence he deems necessary for the full determination of a matter pending before him. He may also cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of the State."

Further it is noted that a referee may punish for contempt and exercise other judicial powers (Labor Code Sections 134

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and 5310; the Board's Rules of Practice and Procedure, § 10800).

C. THE WORKMEN'S COMPENSATION APPEALS BOARD, ACTING AS A REVIEWING COURT, REVIEWED MRS. GRUBB'S CASE.

Mrs. Grubb had her day in court on the "absolute appeal" level.

Mrs. Grubb had and exercised her right to an absolute appeal of her case. By her Petition for Reconsideration she appealed to the Appeals Board which reviewed the entire record and made a judicial determination thereon, which was set forth in the Board's 30 page Opinion and Decision After Reconsideration (Appendix A, the Petition herein).

Whether we call the Appeals Board's review of Mrs. Grubb's case an appeal, or a review, or merely a determination of her right to a new trial, the fact remains that the Workmen's Compensation Appeals Board, an entirely new and different judicial body or court, actually did review the referee's (or trial court's) entire record described in this section, paragraph 5, below, as it was required by law to do. (Labor Code Sections 5315; 5900, 5902, 5903, 5906, and 5907.

Based on such review, the Appeals Board did determine that Mrs. Grubb was not entitled to a further hearing, did determine that the referee's determination was supported by substantial evidence, did determine that Mrs. Grubb was not entitled to workmen's compensation benefits for her husband's death, and did affirm and adopt the trial court's Findings and Award. (Opinion and Decision on Reconsideration, Appendix A, the Petition for Certiorari).

That the Appeals Board was required to review the record is apparent from the case of Allied Comp. Ins. Co. v. Ind. Acc. Com. (1961), 57 Cal. 2d 115, where after citing the two Morgan cases

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(Rev. 1 70)

the Supreme Court of California held that the then Industrial Accident Commission (now the Appeals Board), in exercising judicial functions now assigned to the Appeals Board, was required to make an independent examination of the record, saying at page 120:

> ". . . The obligation of the panel members was to achieve a substantial understanding of the record by any reasonable means, including the use of the referee's summary. . ."

That the Appeals Board acts as a court or judicial body is indicated at some length in Subdivision III, Section A, hereof.

That the Appeals Board is in effect, or at least partially so, an appellate court, as the name Appeals Board implies, is indicated by the recent cases of Garza v. WCAB (1970), 3 Cal. 3d 312, and Michon v. WCAB (1971), 15 Cal. App. 3d 917, which determined that the Board may not overturn the referee's determinations arbitrarily or capriciously but may only do so where its independent appellate type review of the record discovers the existence of one of the grounds for reconsideration specified in Labor Code Section 5903.

The following demonstrates more specifically that the Board had before it and considered carefully the very complete record prepared by the trial referee and all of Mrs. Grubb's contentions and arguments:

1. The record before the Appeals Board was very complete. Except for Mrs. Grubb's own testimony, all testimony was set forth in verbatim reporter's transcript. All of the testimony, including Mrs. Grubb's was also carefully summarized by the referee. The only other evidence consisted of written medical reports and records and the death certificate which were also a part of the record.

CALIFORNIA
Labor Agency
Industrial Relations
Industrial Accidents
Compensation Appeals Board

2. The Board also had before it Mrs. Grubb's 58 page Petition for Reconsideration with her complete version of the facts of the case and her various contentions and arguments.

Respondent PG&E's 33 page Answer to Petition for Reconsideration, setting forth PG&E's version of the facts and its contentions and arguments.

3. On December 4, 1969, the Appeals Board filed its Opinion and Order Granting Reconsideration, stating "After review of the record, the Board is of the opinion that this matter should be granted for study, for such further proceedings as may then be indicated by the record, and for this Board's decision following reconsideration."

5. On July 1, 1970, the Appeals Board filed its 30 page Opinion and Decision After Reconsideration (Appendix A, the Petition for Certiorari), which fully discussed the case, record, and contentions; vacated, annulled and set aside the Board's Opinion and Order Granting Reconsideration; and affirmed and adopted the trial referee's Findings and Award. A reading of the Board's Opinion and Decision clearly shows beyond question that the Board reviewed the entire record with great thoroughness and considered carefully all aspects of the case, particularly the medical evidence which is quoted at length.

D. THE CALIFORNIA DISTRICT COURT OF APPEAL REVIEWED THE CASE AND MADE A JUDICIAL DECISION IN DENYING A WRIT OF REVIEW.

Mrs. Grubb had her day in Court in the California District Court of Appeal.

In passing upon Mrs. Grubb's Petition for Writ of Review, the California District Court of Appeal had before it all of the facts and circumstances of the Grubb case and all of Mrs. Grubb's arguments on the merits. And the District Court of Appeal made a judicial decision on all of such matters when it denied Mrs. Grubb's request for a writ of review.

To be more specific. On July 30, 1970, Mrs. Grubb filed her 83 page Petition for Writ of Review with her version of the facts of the case and her various contentions and arguments.

Subsequently, about November 24, 1970, the Board filed its 43 page Answer to Petition for Writ of Review, setting forth its version of the facts and its arguments, and respondent PG&E filed its answer.

Thereafter, Mrs. Grubb filed her 34 page Reply to Answers of Respondents.

Thus when the California District Court of Appeal considered the case, it had before it a complete discussion of the facts and law, and, in denying the Petition for Writ of Review, that Court exercised its judicial powers and reached a judicial determination. As the Court said in Napa Valley Electric Co. v. Board of Railroad Com'rs of California (1919), 251 U. S. 366; 40 S. Ct. 174; 64 L. Ed. 310; at page 373 official report:

> ". . . And we agree with the District Court that 'the denial of the petition was necessarily a final judicial determination. . . .'"

And the California Courts agree that while the writ issues

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Agency
Industrial Relations
Labor Accidents
Compensation Appeals Board

only in the sound discretion of the court, such discretion is a judicial discretion to be exercised upon sound legal principles and not in an arbitrary or unreasonable manner. LaVore v. Ind. Acc. Com. (1938), 29 Cal. App. 2d 255, at page 259 (Petition for Hearing in California Supreme Court denied).

While Mrs. Grubb mentions that she did not receive a "hearing" in the appellate courts, she uses this term apparently in the sense that she did not have an opportunity for "oral argument". She actually had a "hearing" in the real sense for the District Court of Appeal and the California Supreme Court both considered her case on the basis of the extensive statements of facts and arguments presented, and undoubtedly the Courts based their decisions upon the facts and arguments so presented.

E. THE CALIFORNIA SUPREME COURT REVIEWED THE CASE AND MADE A JUDICIAL DETERMINATION IN DENYING A HEARING.

Mrs. Grubb had her day in court before the California Supreme Court. That court, too, had all the facts and arguments before it when it denied Mrs. Grubb's Petition for Hearing.

Not only did the California Supreme Court have all of the petitions and Statements of Fact and Arguments filed by the parties in the District Court of Appeal, but in addition Mrs. Grubb filed an extensive argument with her Petition for Hearing in the Supreme Court, and respondents PG&E and the respondent Board both filed separate additional answers in the Supreme Court proceeding.

The Board submits that the California Supreme Court also exercised its sound discretion and made a sound judicial determination in denying Mrs. Grubb's Petition for a Hearing in that court.

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Compensation Appeals Board
... Form 61 (Rev. 1 70)

F. DUE PROCESS DOES NOT REQUIRE ANY PARTICULAR TYPE OF APPEAL OR REVIEW.

Contrary to Mrs. Grubb's contentions, the Fourteenth Amendment does not require that state law provide some particular form of appeal or review of trial court proceedings by the state's appellate courts. (Simon v. Craft (1900), 182 U. S. 427, 437; 21 S. Ct. 836; Louisville & Nashville Railroad Co. v. Schmidt (1899), 177 U. S. 230, 236; 20 S. Ct. 620.)

Indeed, this Court has said that the right of appeal is not essential to due process provided that due process (as here) has already been accorded in the tribunal of first instance. (Ohio v. Akron Park Metropolitan District, et al.(1929), 281 U. S. 74, 80; 50 S. Ct. 228; Dohany v. Rogers (1929), 281 U. S. 362, 369; 50 S. Ct. 299.)

IV

MRS. GRUBB WAS NOT DENIED EQUAL PROTECTION OF THE LAW.

Mrs. Grubb has been afforded equal protection of the law as required by the Fourteenth Amendment. Her contentions to the contrary are based upon incorrect views as to both the law and the facts involved in this case.

A. THE WORKMEN'S COMPENSATION APPEALS BOARD IS NOT AN ADMINISTRATIVE AGENCY. ITS DETERMINATIONS ARE NOT ENTITLED TO THE "ABSOLUTE" JUDICIAL REVIEW ACCORDED CERTAIN ADMINISTRATIVE AGENCIES.

At line 27, page 7, the petition herein, Mrs. Grubb contends that "Denial of an absolute right to judicial review of a determination of an administrative agency is per se a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment."

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Again Mrs. Grubb's basic premises are false.

First of all, the Appeals Board is not an administrative agency but is considered to be a Court -- although one of limited jurisdiction (Section III hereof).

Second, there is no absolute right to any particular form of judicial review and Mrs. Grubb cites no authority for her assertion. This Court has held that denial of a Petition for Writ of Review by California appellate courts is a judicial act and constitutes a judicial determination. Napa Valley Electric Co. v. Board of Railroad Com'srs. (1919), 251 U. S. 366; 40 S. Ct. 174; 64 L. Ed. 310.

Here the hearings before the trial referee and the appellate type review by the Appeals Board constituted a day in trial court and a day in an appellate tribunal and meet the test that Mrs. Grubb herself concedes is correct (line 15, page 9, the petition herein) when she admits that "if one has had a full (and fair?) trial in a lower court, 'due process of law' does not require an absolute right of review by an appellate court." (Ohio v. Akron Park Metropolitan District (1929), 281 U. S. 74, 80; 50 S. Ct. 228 supports such a conclusion.

As the Court said in Irvine v. Citrus, et al. (1944), 62 Cal. App. 2d 378 (Petition for Hearing in California Supreme Court denied), at page 382:

> "It is not necessary to satisfy the constitutional requirements of due process that there be a judicial hearing and trial before the courts. It is satisfied by providing for a hearing, after notice, before a board or officer empowered to hear and determine the issues presented. (City of Seattle v. Kelleher, 195 U. S. 351 [25 S. Ct. 44, 49 L. Ed 232]; United

OF CALIFORNIA
Relations Agency
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of Industrial Accidents
Compensation Appeals Board

States v. Ju Toy, 198 U. S. 253 [25 S. Ct. 644, 49 L. Ed 1040]; Fallbrook Irrigation District v. Bradley, 164 U. S. 112 [17 S. Ct. 56, 41 L. Ed. 369] . . .)"

B. EQUAL PROTECTION WAS NOT DENIED SIMPLY BECAUSE DIFFERENT TYPE OF APPEAL OR REVIEW IS AUTHORIZED FOR DECISIONS OF CALIFORNIA ADMINISTRATIVE AGENCIES.

Again Mrs. Grubb apparently does not realize that the Workmen's Compensation Appeals Board is not an administrative agency, but is a constitutional judicial body or court with distinct judicial functions, powers, and authority.

Mrs. Grubb complains (line 1, et seq., page 11, the Petition for Certiorari) that California law denies an absolute right of judicial review in workmen's compensation cases, but provides such an absolute right in connection with "virtually all other administrative agencies and proceedings in the State of California." Thus, Mrs. Grubb argues, California has discriminated against those seeking relief before the Workmen's Compensation Appeals Board and has thereby denied her due process and equal protection of the law.

The Board answers that the different type of review provided for workmen's compensation proceedings and determinations under the California Constitution, Article XX, Sec. 21, and by California Labor Code Sections 5950, 5951, 5952, and 5953, is completely adequate and proper because there is a distinct difference between the administrative agencies, to which Mrs. Grubb refers above, and the Appeals Board's referees and the Board itself. Undeniably the latter are constitutional judicial entities or courts and are part of the California judiciary -- although possessing limited jurisdiction.

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of Industrial Accidents
Compensation Appeals Board
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This distinction is well recognized in California. After the 1965 creation of the Workmen's Compensation Appeals Board, to exercise only judicial functions and powers, the distinction became more readily apparent, but it has long been considered elementary that at least two entirely different types of adjudicative agencies have existed under California law in addition to the regularly designated courts.

As the Court said in Rudolph v. Athletic Commission, et al. (1960), 177 Cal. App. 2d 1, at page 6:

> "While legislatively created statewide agencies do not have judicial powers without constitutional sanction in some form, and their rulings are subject to independent weighing of the evidence by a court, that is not true of such agencies as are created by the Constitution and thereby given adjudicatory power or given such power by the Legislature in the exercise of a delegation of authority conferred upon it by the Constitution [citing numerous California cases]."

The distinctions between the two types of agencies is well brought out in 2 Cal. Jur. 2d, Administrative Law, Section 12, page 23, which describes the constitutional judicial functions and background of the Appeals Board as follows:

> "The industrial accident commission and public utilities commission are administrative agencies that

CALIFORNIA
Relations Agency
of Industrial Relations
Industrial Accidents
Compensation Appeals Board
Form 61 (Rev. 1-70)

derive power within their respective areas of authority through express constitutional grants of plenary power to the legislature, unlimited by other provisions of the constitution, and through enabling legislation enacted thereunder. They exercise judicial powers, and are sometimes characterized as courts of special jurisdiction. To distinguish the unique position of these commissions among administrative agencies, they are commonly designated 'constitutional agencies', and, because of their preferred status, the general rules of administrative law in many instances are not controlling upon them. . . [I]t is important to bear in mind at all times that the source of their power comes from special constitutional provisions, that each occupies a special, favored legal status, and that the rule applied may be based upon the special status of the commission as a party, though the court does not expressly say so." (Emphasis added)

C. REVIEW OF WORKMEN'S COMPENSATION APPEALS BOARD DETERMINATIONS IS NOT GOVERNED BY CALIFORNIA'S ADMINISTRATIVE PROCEDURE ACT.

In presenting her contention described in the last preceding subdivision, Mrs. Grubb is apparently complaining that she is not entitled to the trial de novo in the California Superior Court and the "absolute right of appeal"to the California District Court of Appeal after such trial de novo (line 1, et seq., page 11, the petition herein),which are authorized for California administrative agencies which are governed by the California

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Relations Agency
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Administrative Procedure Act (Government Code Section 11500, et seq.) and which are subject to "administrative mandamus" (Code of Civil Procedure, Section 1094.5).

Since California has adopted a complete system of workmen's compensation under its State Constitution, California quite properly does not permit trial (de novo or otherwise) of workmen's compensation cases by any other courts than the Workmen's Compensation Appeals Board (Labor Code Section 5952), and California specifically limits appellate review to that by appellate courts (i.e., the District Court of Appeal and the Supreme Court.) (Labor Code Section 5955). California Constitution, Article XX, §21

As was said in 2 Cal. Jur. 2d, Administrative Law, Section 85, page 168, footnote 9, concerning the Administrative Procedure Act:

> "9. The act does not govern formal adjudication of the industrial accident commission (Workmen's Compensation), the public utilities commission (Public Utilities and Services), the state personnel board (Civil Service), the California employment stabilization commission (Unemployment Insurance), local agencies, and many others.
>
> "No attempt is made to cover informal adjudications. . ."

And 2 Cal. Jur. 2d, Administrative Law, Section 103, page 195 states

> ". . . The act [California Administrative Procedure Act] is designed primarily to govern licensing and disciplinary proceedings, and does not purport to cover the adjudicative proceedings of all state agencies. The most prominent agencies whose procedure is not governed by the act are the industrial

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accident commission, the public utilities commission, and the state bar."

D. THE APPEALS BOARD AND CALIFORNIA LAW DID NOT APPLY STRICTER STANDARDS OF PROOF IN THIS CASE THAN IN OTHERS.

At line 9, page 14, the petition herein urges that "the State of California, by refusing to review the determination of the Workmen's Compensation Appeals Board in this case, is permitting to stand and is enforcing and applying a rule of law that imposes stricter, more onerous and difficult standards of proof in heart death cases than in other workmen's compensation cases. What is involved is a stricter standard of proof, a stricter degree of proof, a stricter and narrower interpretation and application of the legal concept and doctrine of 'proximate cause'".

The foregoing is simply not a correct statement. Mrs. Grubb does not back up her argument by producing one pertinent illustrative case in which California courts or statutes apply or have applied less strict standards of proof in any other type of industrial injury or in an injury to any other part of an employee's body.

The Board submits that neither the Board nor California law imposes stricter, more onerous, or more difficult standards of proof in heart death cases than in other types of industrial injuries to other parts of the body.

The case of Wiseman v. Ind. Acc. Com. (1956), 46 Cal. 2d 570, cited at line 18, page 14, the petition, is not a proximate cause case at all. Involved there was principally the question of whether the decedent was in the course of his employment when he died in a fire off the employer's premises. Since the fire was obviously the proximate cause of Wiseman's death, was clearly a hazard to which he was exposed by his employment, the question of proximate cause of death did not arise at all after the California

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Accidents

Supreme Court determined Wiseman was in the course of his employment.

Different questions arise and different proof may be required in order to show that different types of disease, conditions, or disabilities are caused by a given employment (in heart attack cases, in back injuries, skin eruptions, silicosis, cancer, emphysema, arteriosclerosis, strokes, arthritis, muscular atrophy, and other conditions). But the Board and California statutes consistently apply comparable standards of proof in all cases pertaining to the same type or class of disease, condition, or disability.

In this connection this Court said in Dohany v. Rogers, supra, 281 U. S. 362, at page 369; that the equal protection clause does not require "uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another." Missouri v. Lewis (1879), 101 U.S. 22, 30-31; National Union of Marine Cooks v. Arnold (1954), 348 U.S. 37; 75 S. Ct. 92.

E. THE APPEALS BOARD AND CALIFORNIA APPELLATE COURTS APPLY THE SUBSTANTIAL EVIDENCE RULE.

Mrs. Grubb argues (line 14, et seq., and footnote 8, page 17, her petition) "that California limits judicial review of administrative agency findings of fact to the narrow scope of determining whether the agency's findings, inferences or decision is supported by any evidence; and the reviewing court is not required, or permitted, to make such determination based upon the broader concept of 'substantial evidence on the record as a whole.'"

On the same page Mrs. Grubb's footnote 8 states: "Although California Labor Code, Section 5952 refers to 'substantial

CALIFORNIA
Relations Agency
of Industrial Relations
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Compensation Appeals Board
Form 61 (Rev. 1-70)
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evidence,' it does not state or mean 'on the record considered as a whole' . . ."

Mrs. Grubb's argument is completely contrary to California statutory and case law, and the footnote is completely refuted by the unquoted first sentence of Labor Code Section 5952 which provides specifically:

> "The review by the court shall not be extended further than to determine, based upon the entire record . . . whether: (d) The order, decision, or award was not supported by substantial evidence."
> (Emphasis added)

Further, the California Appellate Courts consistently refuse to recognize workmen's compensation referee or Board determinations which are not supported by substantial evidence as shown by the entire record. The most important recent germane opinion of the California Supreme Court is LeVesque v. WCAB (1970), 1 Cal. 3d 627, 463 P. 2d 432, where the Court annulled the decision of the Board and referee because it was not supported by substantial evidence, saying at page 637 of the official report:

> "We must return to the very explicit language of section 5952 [Labor Code] to determine the proper scope of judicial review of the evidence in workmen's compensation cases: 'The review by the court shall not be extended further than to determine, based upon the entire record . . . whether . . . [T]he order, decision, or award was not supported by substantial evidence.' We must disapprove of any contradictory language in the above opinions and in the cases that generated and derive from them. [citations] In reviewing the evidence our legislative

mandate and sole obligation under section 5952 is to review the entire record to determine whether the board's conclusion was supported by substantial evidence . . .

". . . Having reviewed the entire record, we conclude that the referee's conclusion lacks the support of substantial evidence." (Emphasis added)

Also of interest is Garza v. WCAB (1970), 3 Cal. 3d 312, p. 317.

CONCLUSION

Respondent Appeals Board submits that there has been no violation of due process requirements and that petitioner has failed to present any federal question. It is respectfully submitted that, for the reasons set out above, the Petition for Writ of Certiorari should be denied.

Dated, San Francisco, California,
November 17, 1971

Respectfully submitted,

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